Evergreen America Corporation *and* International Longshoremen's Association, AFL-CIO. Case 22–CA–25542

April 25, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on January 9, 2003, the General Counsel issued the complaint on February 5, 2003, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain and to furnish relevant and necessary information following the Union's certification in Case 22–RC–12225 as bargaining representative of the Respondent's port captains, assistant port captains and engineers. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint, and asserting affirmative defenses.

On February 24, 2003, the General Counsel filed a Motion for Summary Judgment. On February 26, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the certification on the ground that its port captains, assistant port captain, and engineer are managerial employees.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.[1] We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

We also find that there are no factual issues warranting a hearing regarding the Union's request for information. The complaint alleges, and the Respondent's answer admits, that the Union requested the following information by letter dated December 4, 2002:

> [A] copy of all existing official administrative service contract(s) ("the Plan Document"), including all applicable Amendments, Attachments, Supplements or Revision thereof, that the Company's Plan Administrator maintains on file for vendors who have been contracted to cover retirement and medical benefits currently available to employees represented by the Union.
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> Examples:
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> 1. Money Purchase Plan
> 2. 401(k) Plan
> 3. Medical Plan (Two Types: Insured Plan and Health Maintenance Organization)
> 4. Prescription Drug Plan
> 5. Dental Plan
> 6. Orthodontic Plan
> 7. Vision Plan
> 8. Mental Health
> 9. Long Term Care
> 10. Chiropractor Plan
> 11. Short Term Disability Insurance
> 12. Long Term Disability Insurance
> 13. Life and Accidental Death and Dismemberment Insurance.
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> Regarding the thirteen (13) Plans listed . . . above . . . —Identify plan benefits not provided, however, if a benefit(s) is or are linked to a specific plan, i.e. Medical, then annotate as such.
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> Additionally, the Union would appreciate a copy of the "Plan Document" covering Medical benefits provided to office workers under the O.C.U. Agreement at the Port of Los Angeles.

[1] The Respondent asserts that exceptional circumstances exist to revoke the certification and reconsider whether the bargaining unit includes managerial employees because the Board, on November 21, 2002, granted review of the Acting Regional Director's decision in another case (*COSCO North America*, 22–RC–12236) finding that COSCO's port captains are not managerial employees. The Respondent made the same argument in a motion for reconsideration and revocation of the certification in the representation proceeding, and we denied the motion by unpublished order dated January 8, 2003.

Although the Respondent's answer denies that the Respondent has refused to provide the foregoing information, the General Counsel's motion attaches an affidavit by the Union's International representative, Robert Levy, stating that the Respondent has not responded to the Union's information request. The General Counsel's memorandum in support of the motion also specifically requests that the Respondent be ordered to provide the requested information to the Union. The Respondent has not disputed the affidavit or contested the propriety of such an order in its response to the notice to show cause.[2]

The Respondent's answer also denies that the requested information is relevant and necessary to the Union's performance of its duties as the exclusive bargaining representative. However, it is well established that such information is presumptively relevant for purposes of collective bargaining and must be furnished on request. See *Cheboygan Health Care Center*, 338 NLRB No. 115 (2003); *Baker Concrete Construction*, 338 NLRB No. 48 (2002); and cases cited therein. The Respondent has not asserted any basis for rebutting the presumption, apart from its argument, rejected above, that the Union's certification is invalid.

In these circumstances, we find that the Respondent's denials in its answer that it refused to provide the requested information and that the information is necessary and relevant do not raise any issue for hearing. See, e.g., *Overnite Transportation Co.*, 319 NLRB 646 (1995), enfd. 104 F.3d 109 (7th Cir. 1997).

Accordingly, we grant the Motion for Summary Judgment.[3]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation, with an office and place of business in Morristown, New Jersey, has been engaged in the collection, transport, and shipment of international freight. During the 12-month period preceding the issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of $50,000 for the transportation of freight from the State of New Jersey directly outside the State of New Jersey. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held September 10, 2002, the Union was certified on November 15, 2002, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

> All full-time and regular part-time Port Captains, Assistant Port Captains and Engineers employed by the Employer at its Morristown, New Jersey facility, excluding all office clerical employees, sales employees, forepersons, supervisors, and guards as defined by the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

By letters dated November 26 and 29 and December 10 and 18, 2002, the Union requested the Respondent to bargain. In addition, by letter dated December 4, 2002, the Union requested the Respondent to furnish information. The Respondent has refused to bargain with the Union since about November 26, 2002, and has refused to provide the requested information since about December 4, 2002. We find that the Respondent's conduct constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSION OF LAW

By refusing since November 26, 2002, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, and by refusing since December 4, 2002, to furnish the Union requested information, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

[2] It appears that the denial in the Respondent's answer may have been inadvertent. As indicated above, the Respondent admits that it is refusing to bargain with the Union in order to challenge the Union's certification on judicial review. Further, as discussed infra, the Respondent's answer denies that the requested information is relevant and necessary. Providing the requested information to the Union would not appear to be consistent with these positions. Finally, we note that the General Counsel's memorandum states, incorrectly, that the Respondent's answer admits that the Respondent refused to provide the information. The Respondent's response does not object to this misstatement.

[3] Chairman Battista and Member Schaumber note that they did not participate in the Board's original October 18, 2002 order denying the Respondent's request for review of the Acting Regional Director's Decision and Direction of Election in the underlying representation proceeding. However, as indicated above (fn. 1, above) they participated in the Board's January 8, 2003 order denying the Respondent's motion for reconsideration and revocation of the certification, and they find that the Respondent has not raised any new matters or special circumstances warranting a hearing in this proceeding or reconsideration of the decision in the representation proceeding. Accordingly, they find that summary judgment is appropriate.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement. We also shall order the Respondent to furnish the Union the information requested.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Evergreen America Corporation, Morristown, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Longshoremen's Association, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit, and refusing to furnish the Union information that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

> All full-time and regular part-time Port Captains, Assistant Port Captains and Engineers employed by the Employer at its Morristown, New Jersey facility, excluding all office clerical employees, sales employees, forepersons, supervisors, and guards as defined by the Act.

(b) Furnish the Union the information it requested on December 4, 2002.

(c) Within 14 days after service by the Region, post at its facility in Morristown, New Jersey, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 22 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 26, 2002.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 25, 2003

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

WE WILL NOT refuse to bargain with International Longshoremen's Association, AFL–CIO as the exclusive representative of the employees in the bargaining unit, and WE WILL NOT refuse to furnish the Union information

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

that is relevant and necessary to its role as the exclusive bargaining representative of the unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the following bargaining unit:

All full-time and regular part-time Port Captains, Assistant Port Captains and Engineers employed by us at our Morristown, New Jersey facility, excluding all office clerical employees, sales employees, forepersons, supervisors, and guards as defined by the Act.

WE WILL furnish the Union the information it requested on December 4, 2002.

EVERGREEN AMERICA CORPORATION